No. 11,267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. C. and AGNES GRAHAM, Doing Business as Graham Ship Repair Co.,
Respondents.

BRIEF FOR W. C. AND AGNES GRAHAM, Doing Business as Graham Ship Repair Co., Respondents.

HARDIN, RANK, MELTZER & FLETCHER,
Central Bank Building, Oakland 12, California,
BERNARD B. STIMMEL,
Mills Tower, San Francisco 4, California,
Attorneys for Respondents,
W. C. and Agnes Graham, doing business as Graham Ship Repair Co.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 11,267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

W. C. and AGNES GRAHAM, Doing Business as Graham Ship Repair Co.,
Respondents.

BRIEF FOR W. C. AND AGNES GRAHAM, Doing Business as Graham Ship Repair Co., Respondents.

FACTS AND ISSUES.

The National Labor Relations Board has issued an order against Respondents allegedly designed to effectuate the purposes of the act (National Labor Relations Act, 49 Stat. 449), designed "to diminish the cause of labor disputes burdening or obstructing interstate and foreign commerce * * *" the stated policy of which is in part "Experience has proved that the protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain rec-

ognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

The admitted and undisputed facts upon which the Board's order is based are succinctly these: (1) In December, 1944, Respondent leased a ship repair yard in Oakland, California, and took possession thereof on January 1, 1945. (R. 98, 112-114, 118; Board's Brief 4.) (2) Thereafter, Respondent sought manpower to operate the yard. (R. 258.) (3) Council advised Respondent that no manpower would be furnished unless he signed Council's ship-repair agreement. (R. 259; Board's Brief 5.) (4) A memorandum was executed on January 2nd and the agreement signed on January 9, 1945. (R. 251-252, 281-282; Board's Brief 5-6.) (5) On January 5, the Union contacted Respondent and requested it to sign the standard contract for the machinists. (R. 176-177.) Respondent agreed and requested the Union to bring its contract to the yard on January 17th for signature. (R. 179; Board's Brief 6.) The Council thereafter took the position that the agreement Respondent had signed with it was a complete closed shop agreement and that they would not let the yard operate unless it was such an agreement. (R. 243, 295-297; Board's Brief 7, 12.) Respondent advised the Union of Council's interpretation of the agreement and requested the Union's assistance in persuading the Council to permit Respondent to deal

with the Union for the machinists. (R. 244-245; Board's Brief 6-7.) Thereafter, a series of negotiation conferences were held by Respondent with the Council wherein Respondent sought to persuade the Council to waive its claim to exclusive jurisdiction of the machinists. (R. 246; Board's Brief 6.) During this period Respondent continued to hire machinists through the Union and the Union permitted the men to work in the yard alongside of the AFL crafts (R. 142, 207, 250, 342-343; Board's Brief 7) and no AFL machinists were hired or permitted to work at the yard. (R. 297.) On January 25th the Council advised Respondent that unless machinists from the AFL were put to work they would consider the agreement abrogated, feel under no further obligation to furnish any other craftsmen and would withdraw those AFL employees then working in the yard and put them into firms which fulfilled their contracts with the AFL. (R. 295-297; Board's Brief 7.) On the evening of the same day three AFL machinists came to the yard and were hired by Respondent (R. 208-209) and the Union machinists were pulled from the yard. (R. 375.) Only one machinist from the Union, who received special permission from its business agent to complete some important work, reported at Respondent's yard the following day. (R. 217-218, 209-210.) The Union machinists would not work with the AFL machinists. (R. 218-219, 137-138.) About ten days or two weeks later the Union machinists were paid off by Respondent. (R. 224.) No copy of the Council agreement or any notice to the effect that Union machinists

would not be employed after January 25th was ever posted by Respondent. (R. 134, 154-255.) Respondent continued negotiations with the Union and advised the business agent that he was sorry such a situation had come up and asked for advice as to what legal procedure would have to take place to settle the controversy. (R. 184.) About February 1st, Respondent advised the Union he would like the matter straightened out and that he felt it would have to go to some appropriate government agency. (R. 184; Board's Brief 7.) Thereafter, the Union filed charges of refusal to bargain and discriminatory discharge with the National Labor Relations Board. (R. 184-185.) Respondent filed no answer to the charges and appeared before the Board only for the purpose of presenting the full facts. Respondent was, and is, anxious to have this controversy between the Council and the Union brought to a conclusion by an appropriate agency empowered to determine such a jurisdictional dispute and to that end has at all times been ready and willing to abide by the lawful decision of the Board or any other department of the government which would assume jurisdiction to resolve the issues and enforce such decision when made.

Upon these facts, the Petition for Enforcement of the Board's order brings before the Court the following issues:

(1) Is there substantial evidence to support the finding and conclusion that as a matter of law Respondent refused to bargain collectively with the Union.

(2) Is there substantial evidence to support the finding and conclusion that as a matter of law Respondent discriminated in the hire and tenure of employment of the fourteen named employees to discourage membership in the Union and encourage membership in the Council.

(3) Is there any substantial evidence to support the finding and conclusion that as a matter of law Respondent interfered with, restrained and coerced his employees in the exercise of the rights guaranteed in Section 7 of the Act.

(4) If, as a matter of law the acts of Respondent can be held to have violated the Act in any of the above particulars, is the remedy proposed by the Board proper to effectuate the purposes of the Act under the facts and circumstances of this case.

ARGUMENT.

IS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AND CONCLUSION THAT AS A MATTER OF LAW RESPONDENT REFUSED TO BARGAIN COLLECTIVELY WITH THE UNION?

The evidence is that Respondent never refused to bargain collectively with the Union. From January 4th to the middle of February numerous meetings were held with representatives of the Union. (R. 130, 131, 148, 149, 150, 158, 160, 175, 176, 179, 180, 181, 184, 186, 244, 245, 246, 247, 365, 366.) Respondent's superintendent was authorized and directed to sign an agreement with the Union and its business agent was

requested to deliver a contract for signature. (R. 131, 149, 150, 158, 159, 179.) Between January 2nd and January 25th only machinists who were members of the Union were permitted to work in the yard. (R. 143, 153, 182.) Respondent continually requested the business agent of the Union to assist in resisting Council's claim of a "closed shop." (R. 244, 245, 246, 247.) Even after the Council had exercised its will of having AFL machinists work in the yard and members of the Union had walked out, Respondent continued to meet with the representative of the Union and stated that he was "sorry" (R. 184) that he would like "advice as to what legal procedure would have to take place to settle the controversy * * *" (R. 184) that "he felt it would have to go to some appropriate government agency" (R. 184) and that "he had to let it go through the channels of the constituted government agency." (R. 186.)

Section 8 (5) declares that it shall be an unfair labor practice for an employer "to *refuse* to bargain collectively with representatives of his employees * * *" (italics ours) and we assume the statute means what it says in simple English. Nowhere does the evidence in this case show that Respondent ever *refused* to bargain collectively with the Union. The fact is that Respondent at all times expressed a desire and a complete willingness to bargain collectively with the representative of the Union. True, Respondent never executed a collective bargaining agreement in writing with the Union, but the reason is obvious and the result is the same. Until January 25th, Respondent was

operating under an oral agreement reached through collective bargaining with the Union. (R. 179, 180.) This agreement was, and any agreement reduced to writing would have been abrogated when the Council exercised its claimed jurisdiction on January 25th and sent AFL machinists into the yard under threats of closing it down and the Union machinists left their jobs as a result thereof. The evidence is clear and undisputed that Respondent desired to continue to recognize the Council as the representatives of all crafts other than the machinists under its agreement theretofore executed in writing and to recognize the Union as the representative of the machinists pursuant to its oral agreement which it was willing at all times to reduce to writing. Respondent so stated to both labor organizations and bent every effort to obtain this result. That it was prevented from so doing by the deliberate actions of each of the labor organizations, cannot supply the requirement of the statute that it shall be an unfair labor practice for an employer "to *refuse* to bargain collectively with representatives of his employees. * * *" (Italics ours.)

IS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AND CONCLUSION THAT AS A MATTER OF LAW, RESPONDENT DISCRIMINATED IN THE HIRE AND TENURE OF EMPLOYMENT OF THE FOURTEEN NAMED EMPLOYEES TO DISCOURAGE MEMBERSHIP IN THE UNION AND ENCOURAGE MEMBERSHIP IN THE COUNCIL?

Section 8 (3) of the Act provides in part that "it shall be an unfair labor practice for an employer * * * by discrimination in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *"

The evidence is that Respondent never took any action designed to encourage membership in the Council or to discourage membership in the Union. Respondent at all times explicitly stated to each of the organizations that it was his desire that the machinists be members of the Union and all other crafts be affiliated with the Council. (R. 244, 245, 246, 348, 349.) This is conceded by the business representative of the Union, who makes no charge against Respondent to the effect that he at any time attempted to discourage membership in the Union but on the contrary relates numerous instances wherein they discussed Union membership working in the yard and methods for reaching a settlement of the situation precipitated by the action of the Council in placing AFL machinists at work. (R. 175-190.) After the AFL machinists came to the yard the Union machinists would not work alongside them (R. 218-219) and at no time thereafter did the business representative of the Union express a willingness to have the Union machinists

return to their former employment and work along with the other machinists who were working there. (R. 189.) Union's machinists were not laid off by Respondent. (R. 138.) Respondent never posted any notice to the effect that, to continue their employment as machinists, employees had to be affiliated with the AFL or that any man who was affiliated with the CIO could not continue as a machinist. (R. 134.) Not even the contract, which the Council claims embraced the machinists, was ever posted. (R. 134.)

The Board takes the position that Respondent discharged the Union machinists and that the Council's claim of a closed shop contract cannot be a defense. Respondent does not rely upon such contract as a defense and has never evidenced agreement with Council's claim that the agreement constituted a closed shop for all crafts, including the machinists. The undisputed testimony is that Mr. Graham was at all times working with the business representative of the Union in an attempt to get the Council to relinquish its claim for the machinists. (R. 244, 245, 246, 247.) Neither for this or any other reason did respondent discharge any of the Union machinists.

We do not believe the evidence will support the Board's finding of a discriminatory discharge, but, assuming for purposes of argument that it does, the court must find that discouragement of membership in the Union or encouragement of membership in the Council may reasonably be inferred from the circumstances of the discharge. (*National Labor Relations*

Board v. Walt Disney Productions, 146 Fed. (2d) 44; *National Labor Relations Board v. J. G. Boswell Co.,* 136 Fed. (2d) 585, 595; *Western Cartridge Co. v. National Labor Relations Board,* 139 Fed. (2d) 855, 858; *Stonewall Cotton Mills v. National Labor Relations Board,* 129 Fed. (2d) 629, 632; *National Labor Relations Board v. Air Associates,* 121 Fed. (2d) 586, 592; *Martel Mills Corp. v. National Labor Relations Board,* 114 Fed. (2d) 624, 633.) The evidence in this case does not meet this test.

IS THERE ANY SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AND CONCLUSION THAT AS A MATTER OF LAW RESPONDENT INTERFERED WITH, RESTRAINED AND COERCED HIS EMPLOYEES IN THE EXERCISE OF THE RIGHTS GUARANTEED IN SECTION 7 OF THE ACT?

Even before commencement of operations, Respondent engaged a labor relations director who had "spent practically all of his life in the labor movement" (R. 121) and instructed him as follows (R. 124, Testimony of Warren C. Graham):

> "The Witness. After we agreed to employ him, I told him that we wanted to establish fair relations with labor on the West Coast, and his job would be to show that we would try to enjoy pleasant relations with labor, and his job would be to promote such relations.
>
> Q. (by Mr. Royster). Did you——
>
> A. I told him that his job would be to report to me anything that management could do, which would affect those relations."

Thereafter, Respondent contacted Council and executed their ship-repair agreement. (R. 259, 251, 252, 281, 282.) Respondent also met with the Union and entered into an oral agreement with that organization for the machinists to be employed at the yard. (R. 181-182.) By every means at his command Respondent sought to continue this agreeable relationship—and did so until January 25th when the Council forced AFL machinists into the yard (R. 295-297) and the Union "pulled" its men from the yard. (R. 375.)

The unquestioned fair attitude of the company must be taken into consideration in a determination of whether or not it has interfered with, restrained or coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act. (*National Labor Relations Board v. Shenandoah-Dives Mining Co.,* 145 Fed. (2d) 542.)

In *National Labor Relations Board v. J. L. Brandeis & Sons,* 145 Fed. (2d) 556, the Court was called upon to determine whether or not certain statements made by the company to its employees constituted interference, restraint or coercion. In holding the respondent had not committed an unfair labor practice, the Court set forth the test to be applied in the following language:

> "If respondent used coercive language it may be held responsible in these proceedings notwithstanding the constitutional guaranty of the right of free speech. We have fully set forth the remarks of the officers of the respondent because a consideration of the language used must determine

its character. *This is a question of law. The sole statutory test is interference, restraint and coercion.* Secs. 7 and 8, National Labor Relations Act; Wilson and Co. v. NLRB, 8 Cir., 123 Fed. (2d) 411; NLRB v. Star Publishing Co., 9 Cir., 97 Fed. (2d) 465; NLRB v. Cluek Brewing Co., 8 Cir., Fed. (2d) (Opinion filed Aug. 7, 1944); NLRB v. Hudson Motor Car Co., 6 Cir., 128 Fed. (2d) 528." (Italics ours.)

Considering the unquestioned fair attitude of the company in its relations with representatives of its employees for collective bargaining purposes and applying to the evidence in this case the test above set forth, it must follow as a matter of law that Respondent has not at any time interfered with, restrained or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IF, AS A MATTER OF LAW, THE ACTS OF RESPONDENT CAN BE HELD TO HAVE VIOLATED THE ACT IN ANY OF THE ABOVE PARTICULARS, IS THE REMEDY PROPOSED BY THE BOARD PROPER TO EFFECTUATE THE PURPOSES OF THE ACT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE?

In *National Labor Relations Board v. Ford Motor Co.*, 5 Cir., 119 Fed. (2d) 326, it was held that the Court has power to determine if the Board's order is appropriate in view of the facts and circumstances of the particluar case under review. In so holding the Court stated:

"Nothing in the statute, nothing in any of the decisions lends countenance to the view that Congress intended to make of the Circuit Court of Appeals mere rubber stamps, mere perfunctory executors of the Board's unrestrained will. They make the contrary quite clear. It is, therefore, for this court in the performance of its function under the statute to say not blindly, but in the exercise of an informed description, first, whether the findings are supported by the evidence and second, *whether the Board's orders are appropriate under the statute.*" (Italics ours.)

The United States Supreme Court in *Republic Steel Corp. v. National Labor Relations Board* (1940), 311 U. S. 7, has held that the power of the Board is essentially remedial and not punitive, stating in part as follows:

"We think that affirmative action to 'effectuate the policies of this Act' is action to achieve the remedial objective which the Act sets forth * * *"

In *National Labor Relations Board v. Express Publishing Company* (1941), 312 U. S. 426, the Court stated:

"Having found the acts which constitute the unfair labor practice, the Board is free to restrain the practice and other like or related unlawful acts. But, as the Court held in the case of the Federal Trade Commission, see Federal Trade Commission v. Beech-Nut Co., supra (257 U. S. 441, 445), an order not so related should be appro-

priately restricted on review. The breadth of the order, like the injunction of a Court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which to the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. See United States v. Trans-Missouri Freight Association, 166 U. S. 290, 308, 309; Standard Oil Co. v. Brotherhood of Railway Clerks, 281 U. S. 548; Local 167 v. United States, 291 U. S. 293; Virginia Railway Co. v. System Federation No. 40, 300 U. S. 515, 541, 543, 544."

And in *National Labor Relations Board v. May Department Stores Co.,* 154 Fed. (2d) 533, 541, the Court stated:

"* * * the Supreme Court has stated that it is the Board's province 'to determine the needed scope of cease and desist order under the National Labor Relations Act' and the function of the courts merely to test as a matter of law whether the scope of a particular order has a reasonable basis in the situation presented. May Department Stores v. NLRB, 326 U. S. 376, 66 S. Ct. 203, 212, 213, 90 L. Ed. The test of the proper scope of a cease and desist order is whether the Board might

---

For other decisions of the Supreme Court which emphasize the remedial nature of the Board's powers under Sec. 10 (c) see:

Consolidated Edison Company of New York Inc. v. NLRB (1938), 305 U. S. 197;

H. J. Heinz Co. v. NLRB (1941), 311 U. S. 514;

Pennsylvania Greyhound Lines, Inc. v. NLRB (1938), 303 U. S. 261;

Phelps Dodge Corp. v. NLRB (1941), 313 U. S. 177.

> have reasonably concluded from the evidence that such order was necessary to prevent the employer before it from engaging in any unfair labor practice * * * affecting commerce. Id. 66 S. Ct. at pages 211, 212. The Board may not enjoin violations of the provisions of the Act generally merely because a violation of one provision has been proved."

It is not only contended by Respondent that the order issued by the Board and which it herein seeks enforcement by this Court, is too broad in its scope but we also contend that, based upon the evidence before the Court in this case, the order cannot be construed to effectuate the avowed policies of the Act "to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce * * *" and is therefore unlawful. This cause was not before the Board because of any act or thing willingly done by Respondent—this cause was before the Board because of the precipitate action of two labor organizations (1) by the Council in forcing AFL machinists into the yard and (2) by the Union in thereupon withdrawing its machinists members from the yard.

How can an order directed to Respondent requiring him to do that which the evidence discloses he was at all times earnestly attempting to accomplish but from which he was prevented from doing by the action of the labor organizations involved effectuate the stated purposes of the Act? Respondent is ordered to cease and desist from acts which the evidence affirmatively

shows he was at all times openly urging the two labor organizations to permit him to do. As stated by the Court in *National Labor Relations Board v. McGough Bakeries Corporation,* 5 Cir., 153 Fed. (2d) 420:

> "It is our duty as well as the Board's to see that the act is properly and fairly applied, and not brought into disrepute by unlawful or palpably unjust applications of it."

It is clearly established that the validity of the Board's order must depend upon the circumstances of each case and be appropriate to achieve the remedial objectives of the Act. The order under consideration does not meet this test. It appears that this is a case where the Board has been unable to find anyone other than Respondent that it can legally lay lands on and has succumbed to the temptation to issue against him an order to bring about a desired result between the labor organizations involved. Such action by the Board is not only unauthorized by the Act but places the Respondent in the paradoxical position of being ordered to do, under threat of contempt, that which he has been unsuccessfully trying to do.

(1) As stated in Board's Brief (page 21):

> "* * * the Board's order runs only against Respondents, the real parties in interest of this proceeding and in any subsequent contempt action."

(2) Even if Respondent in this case be deemed technically in violation of the Act the admonition of

the Court in *National Labor Relations Board v. Express Publishing Co.,* supra, would appear to be controlling

> "* * * but the mere fact that a Court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

See also

> *National Labor Relations Board v. Armour and Company,* 10th Cir. (on rehearing) January 8, 1945.

For these same reasons the order of the Board as applied to Respondent is punitive, rather than remedial to achieve the objectives of the Act as required by the decisions of United States Supreme Court cited supra. Particularly is this true of that portion of the Board's order requiring Respondent to make whole 14 machinists for their earnings during the time that they have not worked at Respondent's yard. Because of actions of the labor organizations involved the Board assesses Respondent with a punitive fine of many thousands of dollars. How can this be said to effectuate the remedial objectives of the Act where the evidence discloses that at all times it was Respondent's desire that they continue employment with him under conditions of hire and tenure of their own choosing? Reference has many times been made, in judicial opin-

ions and otherwise, of the extreme one-sidedness of the National Labor Relations Act wherein the employer is bound to comply with the orders of the Board but the employees are free to flout the Board's decision and create the anomalous and often calamitous situation wherein an employer is caught, without fault on his part, between the upper and nether millstones. Mindful of the harsh consequences of the Act, we do not believe that Congress intended or the Act authorizes the assessment of a penalty against the employer in a case such as the one under review.

CONCLUSION.

We earnestly submit that for reasons herein set forth the Board's order is against law and should not be enforced.

Dated, September 4, 1946.

Respectfully submitted,
HARDIN, RANK, MELTZER & FLETCHER,
By J. MARCUS HARDIN,
BERNARD B. STIMMEL,
Attorneys for Respondents,
W. C. and Agnes Graham, doing business as Graham Ship Repair Co.